A

GULF BUSINESS CONSTRUCTION (M) SDN BHD

v.

ISRAQ HOLDING SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
AZHAR MA'AH JCA
SYED AHMAD HELMY JCA
[CIVIL APPEAL NO: W-02-1304-2006]

C

10 MARCH 2010

COMPANY LAW: *Winding up - Appeal against winding up - Court order directing respondent to release and refund trust money to petitioner - Respondent never appealed against court order - Whether court order final and binding - Whether legally impossible for respondent to challenge validity of court order in winding up proceedings - Whether just and equitable for respondent to be wound up - Companies Act 1965, s. 218(1)(i)*

D

E

COMPANY LAW: *Winding up - Petition - Affidavit in opposition to petition - Admissibility of affidavit - Non-compliance with r. 30(1) Companies (Winding-Up) Rules 1972 - Clear and unambiguous words of provision - Whether affidavit could not be relied upon*

F

CIVIL PROCEDURE: *Judgments and orders - Order of court - Court order directing respondent to release and refund trust money to petitioner - Respondent never appealed against court order - Whether court order final and binding - Whether legally impossible for respondent to challenge validity of court order in winding up proceedings - Whether just and equitable for respondent to be wound up - Companies Act 1965, s. 218(1)(i)*

G

CIVIL PROCEDURE: *Affidavits - Affidavit in opposition of winding up petition - Admissibility of affidavit - Non-compliance with r. 30(1) Companies (Winding-Up) Rules 1972 - Clear and unambiguous words of provision - Whether affidavit could not be relied upon*

H

STATUTORY INTERPRETATION: *Construction of statutes - Literal approach - Clear and unambiguous words employed in r. 30(1) Companies (Winding-Up) Rules 1972 - Whether effect must be given to them*

I

The petitioner obtained, on 3 June 2005, a court order against the respondent (and another party) for the release and refund of trust money amounting to RM504,000 to the petitioner. Premised upon the court order, the petitioner served a notice under s. 218(1)(e) of the Companies Act 1965 ('Act') on the respondent. Due to the respondent's failure to pay the sum demanded within three weeks from service of the notice, the petitioner filed a petition to wind up the respondent. Prior to the scheduled hearing of the petition, the respondent filed an affidavit in opposition to the petition ('impugned affidavit'). The petitioner, during the hearing of the petition in the High Court, raised an objection as to the admissibility of the impugned affidavit on the ground of non-compliance with r. 30(1) of the Companies (Winding-Up) Rules 1972 ('Rules'). The High Court judge upheld the petitioner's objection and subsequently ordered the respondent to be wound up. Hence, the present appeal by the respondent.

Held (dismissing the appeal with costs)
Per Abdul Malik Ishak JCA delivering the judgment of the court:

(1) Following r. 30(1) of the Rules, the impugned affidavit should have been filed and a copy thereof served on the petitioner or the petitioner's solicitor at least seven days before the hearing date of the petition. This, however, was not done. Effect must be given to the clear and unambiguous words employed in r. 30(1) of the Rules and, accordingly, the impugned affidavit could not be relied upon in opposing the petition to wind up the respondent. *Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd* (refd); *The Sussex Peerage* (refd). (paras 15-17)

(2) There was no appeal against the court order dated 3 June 2005. Thus, for all intents and purposes that court order must be construed as final, conclusive and binding. It was legally impossible for the respondent to challenge the validity of that court order in the winding up proceedings. On the facts, the respondent was insolvent and unable to repay the trust money in the sum of RM504,000 in compliance with the court order dated 3 June 2005. In the circumstances, it was just and equitable for the respondent to be wound up within the ambit of s. 218(1)(i) of the Act. Furthermore, the winding up of the respondent was supported by the supporting creditor, who was the only party that gave the notice of intention to appear. This

was a watertight case for the petitioner. Nothing turned in favour of the respondent. *Sovereign General Insurance Sdn Bhd v. Koh Tian Bee* (refd); *Re Tioh Ngee Heng; ex p Yap Kiu Lian @ Norhashimah Yap (Administratrix of the estate of Mohamad Sharif bin Haji Hussain* (refd). (paras 19-22 & 26-27)

Bahasa Malaysia *Translation Of Headnotes*

Pempetisyen memperolehi, pada 3 Jun 2005, suatu perintah mahkamah terhadap responden (dan satu pihak lain) bagi pelepasan dan pemulangan bayaran wang amanah sebanyak RM504,000 kepada pempetisyen. Berdasarkan perintah mahkamah tersebut, pempetisyen menyampaikan notis di bawah s. 218(1)(e) Akta Syarikat 1965 ('Akta') ke atas responden. Oleh kerana responden gagal membayar jumlah yang dituntut dalam masa tiga minggu dari penyampaian servis notis tersebut, pempetisyen memfailkan suatu petisyen untuk menggulungkan responden. Sebelum pembicaraan petisyen yang telah dijadualkan, responden memfailkan suatu afidavit menentang terhadap petisyen tersebut ('afidavit yang dipertikai'). Pempetisyen, semasa pembicaraan petisyen tersebut di Mahkamah Tinggi, membangkitkan bantahan mengenai kebolehterimaan afidavit yang dipertikai atas alasan ketidakpatuhan dengan k. 30(1) Kaedah-Kaedah (Penggulungan) Syarikat 1972 ('Kaedah-Kaedah'). Hakim Mahkamah Tinggi membenarkan bantahan pempetisyen dan kemudiannya mengarahkan responden diggulungkan. Oleh yang demikian, rayuan semasa oleh responden.

Diputuskan (menolak rayuan dengan kos)
Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

(1) Mengikut k. 30(1) Kaedah-Kaedah, afidavit yang dipertikai sepatutnya difailkan dan satu salinan disampaikan ke atas pempetisyen atau peguam pempetisyen sekurang-kurangnya tujuh hari sebelum tarikh pembicaraan petisyen tersebut. Ini, walau bagaimanapun, tidak dibuat. Kesan mesti diberi kepada perkataan-perkataan jelas dan nyata yang digunakan dalam k. 30(1) Kaedah-Kaedah dan, oleh itu, afidavit yang dipertikai tidak boleh diharapkan dalam menentang petisyen untuk menggulungkan responden. *Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd* (dirujuk); *The Sussex Peerage* (dirujuk).

(2) Tiada rayuan terhadap perintah mahkamah bertarikh 3 Jun 2005 tersebut. Oleh itu, boleh dikatakan perintah mahkamah tersebut mesti ditafsirkan sebagai muktamad, konklusif dan mengikat. Ia adalah mustahil di sisi undang-undang bagi responden mencabar keesahan perintah mahkamah tersebut dalam prosiding penggulungan. Berdasarkan fakta, responden tak solven dan tidak berupaya membayar balik wang amanah dalam jumlah RM504,000 mengikut perintah mahkamah bertarikh 3 Jun 2005. Dalam keadaan-keadaan, ia adalah adil dan berekuiti bagi responden diggulungkan dalam lingkungan s. 218(1)(i) Akta. Lagipun, penggulungan responden disokong oleh pemiutang menyokong, yang merupakan pihak tunggal yang memberikan notis niat untuk hadir. Ini merupakan kes yang tidak dapat dipertikaikan bagi pempetisyen. Tidak ada apa-apa yang berpihak kepada responden. *Sovereign General Insurance Sdn Bhd v. Koh Tian Bee* (dirujuk); *Re Tioh Ngee Heng; ex p Yap Kiu Lian @ Norhashimah Yap (Administratrix of the estate of Mohamad Sharif bin Haji Hussain* (dirujuk).

Case(s) referred to:

Cornhill Insurance Plc v. Improvement Services Ltd And Others [1986] 1 WLR 114 ***(refd)***

Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd [1997] 3 CLJ 485 CA ***(refd)***

Davis & Co, Ltd, v. Brunswick (Australia), Ltd, Brunswicke-Balke-Collender Co And Brunswick Radio Corporation [1936] 1 All ER 299 ***(refd)***

Dynasty Rangers Sdn Bhd & Anor v. Perak Meat Industries Sdn Bhd [2002] 6 CLJ 1 HC ***(refd)***

Galbraith v. Merito Shipping Co [1947] SC 446 ***(refd)***

Goodwealth Trading Pte Ltd, Re [1991] 2 CLJ 1648; [1991] 4 CLJ (Rep) 822 HC ***(refd)***

Hadkinson v. Hadkinson [1952] P 285 CA ***(refd)***

Hotel Royal Ltd Bhd v. Tina Travel & Agencies Sdn Bhd [1989] 1 LNS 170 HC ***(refd)***

In Re Bleriot Manufacturing Aircraft Company Limited [1916] 32 TLR 253

In re Crown Bank [1890] 44 Ch D 634 ***(refd)***

In re Delhi Steamship Company [1895] 1 Ch 3 ***(refd)***

In re Diamond Fuel Company [1879] 13 Ch D 400 ***(refd)***

In re Haven Gold Mining Company [1882] 20 Ch D 151 ***(refd)***

In re General Phosphate Corporation, In re Northern Transvaal Gold Mining Company, In re Delhi Steamship Company [1895] 1 Ch 3 ***(refd)***

In re German Date Coffee Company [1882] 20 Ch D 169 ***(refd)***

In Re The Newbridge Sanitary Steam Laundry, Ltd [1917] 1 IR 67 ***(refd)***

In re The Varieties, Limited [1893] 2 Ch 235 ***(refd)***

A *In re Wey and Arun Junction Canal Company [1867] 4 LR Eq 197* ***(refd)***
Johnson v. Walton [1990] 1 FLR 350 ***(refd)***
Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 1 LNS 44 SC ***(refd)***
Malayan Plant (Pte) Ltd v. Moscow Narodny Bank Ltd [1980] 1 LNS 44 PC ***(refd)***
B *MBF Finance Bhd v. Sri-Hartamas Dvpt Sdn Bhd [1992] 1 CLJ 160; [1992] 3 CLJ (Rep) 55 HC* ***(refd)***
Metal Reclamation (Industries) Sdn Bhd v. JRC Tenaga Sdn Bhd [2000] 6 CLJ 290 HC ***(refd)***
Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd [1991] 1 CLJ 260; [1991] 1 CLJ (Rep) 317 SC ***(refd)***
C *Ng Ah Kway v. Tai Kit Enterprise Sdn Bhd [1984] 1 LNS 164 HC* ***(refd)***
Palace Restaurants Ltd, Re [1914] 1 Ch 492 ***(refd)***
Pioneer Concrete (M) Sdn Bhd v. Celini Corporation Sdn Bhd [1999] 5 CLJ 145 HC ***(refd)***
D *PT Anekapangan Dwitama v. Far East Food Industries Sdn Bhd [1998] 4 CLJ Supp 437 HC* ***(refd)***
Re a Company [1985] BCLC 37 ***(refd)***
Re Baku Consolidated Oilfields, Ltd [1944] 1 All ER 24 ***(refd)***
Re Bryant Investment Co Ltd [1974] 2 All ER 683 ***(refd)***
Re Chynchen Associates Ltd [1987] 1 HKC 311 ***(refd)***
E *Re Great Northern Copper Mining Co of South Australia, Ltd, Ex p The Co [1869] 20 LT 347* ***(refd)***
Re Kitson & Co, Ltd [1946] 1 All ER 435 ***(refd)***
Re Lympne Investments Ltd [1972] 2 All ER 385 ***(refd)***
Re Mediavision Ltd [1993] 2 HKC 629 ***(refd)***
F *Re Perfectair Holdings Ltd [1990] BCLC 423* ***(refd)***
Re Red Rock Gold Mining Company Limited [1889] 61 LT 785 ***(refd)***
Re San Imperial Corp Ltd (No 2) [1980] 1 HKC 463 ***(refd)***
Re Sunshine Securities (Pte) Ltd, Sunshine Securities (Pte) Ltd & Anor v. Official Receiver And Liquidator of Mosbert Acceptance Ltd [1977] 1 LNS 109 CA ***(refd)***
G *Re Senson Auto Supplies Sdn Bhd [1987] 1 LNS 110 HC* ***(refd)***
Re The Coolgardie Consolidated Gold Mines Limited [1897] 76 LT 269
Re Tioh Ngee Heng; ex p Yap Kiu Lian @ Norhashimah Yap (Administratrix of the estate of Mohamad Shariff Haji Hussain) [2000] 1 LNS 197 HC ***(refd)***
H *Securicor (M) Sdn Bhd v. Universal Cars Sdn Bhd [1984] 1 LNS 124 HC*
Sovereign General Insurance Sdn Bhd v. Koh Tian Bee [1988] 1 CLJ 155; [1988] 1 CLJ (Rep) 277 SC ***(refd)***
Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd [1992] 1 CLJ 637; [1992] 1 CLJ 303 SC
The Sussex Peerage [1844] 11 Clark & Finnelly 85 ***(refd)***
I *Wei Giap Construction Co (Pte) Ltd v. Intraco Ltd [1978] 1 LNS 235 HC* ***(refd)***

Legislation referred to:
Companies Act 1965, s. 218(1)(e), (i), (2)(a)
Companies (Winding-Up) Rules 1972, r. 30(1)

For the petitioner - Lee Chan Leong; M/s Chan Leong & Co
For the respondent - Mahathir Abdullah; M/s Zainudin Wan Nadzim, Chua & Mazlinda

[Appeal from High Court, Kuala Lumpur; Companies Winding Up No: D4-28-635-2006]

Reported by Suresh Nathan

JUDGMENT

Abdul Malik Ishak JCA:

Introduction

[1] The parties will be referred to like what they were referred to at the High Court. Thus, Israq Holding Sdn Bhd (382287-H) will be referred to as the petitioner while Gulf Business Construction (M) Sdn Bhd (307134-P) will be referred to as the respondent.

The Facts And The Analysis Thereto

[2] On 3 June 2005, the petitioner as the plaintiff in the originating summons no: D2-24-123-2005 obtained an order against the respondent who was the second defendant in that originating summons and against Tetuan Par Govind & Co who was the first defendant in that originating summons directing them to jointly and severally release and refund to the petitioner the trust money of RM504,000 together with the interest accrued thereto, if any. That court order can be seen at pp. 46 to 48 of the appeal record at Jilid 2.

[3] The court order dated 3 June 2005 has not been set aside nor varied. It remains as a court order and it is contempt to disobey an order of the court. It is no answer to an action for contempt to argue that the court order should not have been made. The correct course to take would be to challenge the court order by applying to have it set aside. In *Hadkinson v. Hadkinson* [1952] P 285, CA, at p. 288, Romer LJ put it nicely in these salient words:

> It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.

[4] In the same vein, Lord Donaldson of Lymington MR said in *Johnson v. Walton* [1990] 1 FLR 350, CA, at p. 352, that:

> It cannot be too clearly stated that, when an injunctive order is made or when an undertaking is given, it operates until it is revoked on appeal or by the court itself, and it has to be obeyed whether or not it should have been granted or accepted in the first place.

[5] Now, even if the court order was not made jointly and severally against both the respondent and Tetuan Par Govind & Co, yet either one of them would still have to bear the whole of that liability all by itself up to the limit of the judgment on the strength of the authority of the case of *Dynasty Rangers Sdn Bhd & Anor v. Perak Meat Industries Sdn Bhd* [2002] 6 CLJ 1.

[6] Premised upon the court order, a notice under s. 218(1)(e) of the Companies Act 1965 dated 28 March 2006 was issued and served on the respondent's company secretary on 30 March 2006. Of course, the inability to pay the debts is the most commonly relied ground for winding-up a company. An inability to pay is proved by service of the statutory notice under s. 218(2) of the Companies Act 1965 or by other proof of insolvency. According to the case of *Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd* [1991] 1 CLJ 260; [1991] 1 CLJ (Rep) 317, *prima facie* a creditor, like the petitioner here, who has not been paid has the right to file a petition for winding-up whatever its other motives may be.

[7] The test to ascertain commercial insolvency is rather simple. It is this. That the company is unable to meet the current debts as they fall due. And such a company may still be categorised as "unable to pay its debts" even though the company has substantial wealth which cannot be realised immediately and even though on liquidation the company will be able to meet all its liabilities (*Re Sunshine Securities (Pte) Ltd., Sunshine Securities (Pte) Ltd. & Anor. v. Official Receiver And Liquidator of Mosbert Acceptance Ltd.* [1977] 1 LNS 109, CA; *Wei Giap Construction Co. (Pte.) Ltd. v. Intraco Ltd.*

[1978] 1 LNS 235; *Malayan Plant (Pte.) Ltd. v. Moscow Narodny Bank Ltd.* [1980] 1 LNS 44, PC; *Hotel Royal Ltd Bhd v. Tina Travel & Agencies Sdn Bhd* [1989] 1 LNS 170; *MBF Finance Bhd. v. Sri-Hartamas Dvpt. Sdn. Bhd.* [1992] 1 CLJ 160; [1992] 3 CLJ (Rep) 55, at p. 59; *Lian Keow Sdn. Bhd. (In Liquidation) & Anor. v. Overseas Credit Finance (M) Sdn. Bhd. & Ors.* [1988] 1 LNS 44; [1988] 2 MLJ 449 at p. 454, SC; *PT Anekapangan Dwitama v. Far East Food Industries Sdn Bhd* [1998] 4 CLJ Supp 437; and *Pioneer Concrete (M) Sdn Bhd v. Celini Corporation Sdn Bhd* [1999] 5 CLJ 145).

[8] The 21 days (three weeks) period had lapsed, and the respondent failed to pay the sum as demanded or any part thereof. The petitioner had no choice but to file the winding-up petition. Section 218(2)(a) of the Companies Act 1965 enacts as follows:

> Definition of inability to pay debts
>
> (2) A company shall be deemed to be unable to pay its debts if-
>
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorised requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

[9] The demand that is required under s. 218(2)(a) of the Companies Act 1965 can be in any form. There is no prescribed form to follow. So long as there is a notice of demand that is sufficient. The purpose of the notice is to warn the debtor, like the respondent here, of an impending petition (*Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd* [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303, SC). And the notice that is issued to the debtor must relate to a specified debt and that debt cannot be seriously questioned (*Re a Company* [1985] BCLC 37). That debt too must be in a liquidated sum (*Ng Ah Kway v. Tai Kit Enterprise Sdn. Bhd.* [1984] 1 LNS 164). It must be emphasised that the debt must be presently due and owing (*Re Bryant Investment Co Ltd* [1974] 2 All ER 683). And the debtor has 21 clear days (three weeks) to pay and that would exclude the day of service (*Re Lympne Investments Ltd*

A [1972] 2 All ER 385). A note of warning must be sounded. That a statutory notice under sub-section (2)(a) of s. 218 of the Companies Act 1965 cannot be construed to be *prima facie* evidence of the debt (*Metal Reclamation (Industries) Sdn Bhd v. JRC Tenaga Sdn Bhd* [2000] 6 CLJ 290).

B

[10] The failure of the debtor to pay the debt within 21 days (three weeks) after the service of the notice of demand entitles the creditor to present a petition and that petition cannot be restrained by an injunction. And it is not open to the debtor to say that it is C able to pay the debt but chooses not to (*Cornhill Insurance Plc. v. Improvement Services Ltd. And Others* [1986] 1 WLR 114).

[11] The failure on the part of the company to pay as demanded would trigger the presumption that the company is unable to pay its debt. This presumption is, however, rebuttable. The onus shifts onto D the company to show that it is able to pay the debt *(PT Anekapangan Dwitama v. Far East Food Industries Sdn Bhd (supra))*. Thus, the inability to pay on the part of the company gives the requisite jurisdiction of the court to make a winding-up order against the company (*Securicor (M) Sdn. Bhd. v. Universal Cars Sdn. Bhd.* E [1984] 1 LNS 124).

[12] The solicitors for the petitioner issued the statutory notice to the respondent by way of a letter dated 28 March 2006 as seen at p. 49 of the appeal record at Jilid 2. That statutory notice was F worded in this way:

> **Notice under Section 218 of the Companies Act, 1965.**
>
> We act for Israq Holding Sdn Bhd and are instructed to demand from your good selves the sum of RM504,000.00, being the G amount due and owing from your good selves pursuant to an order obtained against your good selves dated 03.06.2005 in respect of Kuala Lumpur High Court Originating Summons No. D2-24-123-2005, the particulars of which are well within the knowledge of your good selves.
>
> H 2. TAKE NOTICE that your good selves shall be deemed to be unable to pay your debts if your good selves were to neglect to pay or to secure or to compound to the reasonable satisfaction of our clients within three (3) weeks from the date of service of this notice the said sum of RM504,000.00 and winding-up petition will be filed I in court against your good selves accordingly.

3. TAKE FURTHER NOTICE that our client reserves their rights to pursue the element of cost and interest at other appropriate forum.

[13] That statutory notice was a good notice in the context of s. 218(2)(a) of the Companies Act 1965.

[14] Now, a day prior to the scheduled hearing of the petition which was on 2 November 2006, the respondent had on 1 November 2006 purported to file and serve an affidavit in opposition to the petition (hereinafter the affidavit in opposition will be referred to as the "impugned affidavit"). And during the hearing of the petition on 2 November 2006 before the High Court judge, the petitioner had raised an objection as to the admissibility of the impugned affidavit on the ground of non-compliance with r. 30(1) of the Companies (Winding-Up) Rules 1972. Without the benefit of the written grounds of judgment of the High Court judge, we are constrained to hear afresh and we have, as demonstrated, able to do so with ease. Be that as it may, r. 30(1) of the Companies (Winding-Up) Rules 1972 states as follows:

30. Affidavits opposing the petition and affidavits in reply.

(1) Affidavits in opposition to a petition that a company may be wound up shall be filed and a copy thereof served on the petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition.

[15] The impugned affidavit should be filed and a copy thereof served on the petitioner or the petitioner's solicitor at least seven (7) days before the hearing date of the petition. This was not done. We were told that the objection was upheld by the High Court judge and rightly so. The mandatory nature of r. 30(1) of the Companies (Winding-Up) Rules 1972 was highlighted by Siti Norma Yaakob JCA (later Chief Judge Malaya) in *Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd* [1997] 3 CLJ 485, CA.

[16] The "literal" rule or the "plain meaning" rule as is known in America is best illustrated by referring to the speech of Tindal CJ in *The Sussex Peerage* [1844] 11 Clark & Finnelly 85, at p. 143. There his Lordship said this:

> ... the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver.

[17] In our judgment, the clear and unambiguous words employed in r. 30(1) of the Companies (Winding-Up) Rules 1972 must be given effect and, accordingly, the impugned affidavit cannot be relied upon in opposing the petition to wind-up the respondent.

[18] It was only on 16 November 2006 that the High Court judge ordered the respondent to be wound up.

[19] It must be emphasised that there was no appeal against the court order dated 3 June 2005. And for all intents and purposes that court order must be construed as final, conclusive and binding.

[20] It is legally impossible for the respondent to challenge the validity of the court order dated 3 June 2005 in the winding-up proceedings. If high authority is required for this simple proposition, the case of *Sovereign General Insurance Sdn. Bhd. v. Koh Tian Bee* [1988] 1 CLJ 155; ([1988] 1 CLJ (Rep) 277), SC, a decision of Lee Hun Hoe CJ (Borneo) should be referred to. There at p. 157 (p. 279), his Lordship had this to say:

> In the exercise of his jurisdiction in bankruptcy proceedings, the learned judge cannot go behind the judgment. Thus on an application to set aside a bankruptcy notice, it was laid down as early as 1893 that the court could not go behind the judgment. See *In re Easton* [1893] 10 Mor. 111; 9 TLR 409. Even if there has been an irregularity in the service of the notice of sale, it is not open to the respondent in this case to challenge the execution proceedings.

[21] In the same vein, Steve Shim J (later Chief Judge, Sabah & Sarawak) in *Re Tioh Ngee Heng; ex p Yap Kiu Lian @ Norhashimah Yap (Administratrix of the estate of Mohamad Shariff bin Haji Hussain)* [2000] 1 LNS 197; [2000] 6 MLJ 155, had this to say at p. 158 of the report:

> It is trite law that an order, even if irregular, is valid and enforceable until set aside. This principle is particularly relevant in bankruptcy proceedings where the court generally will not look behind the judgments or order save in very limited circumstances of fraud or illegality, etc.

[22] In our judgment, the respondent was insolvent. It was unable to repay the trust money in the sum of RM504,000 in compliance with the court order dated 3 June 2005. In the circumstances, it was just and equitable for the respondent to be wound-up within the ambit of s. 218(1)(i) of the Companies Act 1965.

[23] What is just and equitable would vary from case to case. Thus, a company may be wound-up where it is just and equitable that the company should be wound-up. So many reasons can be advanced to wind-up a company under the just and equitable principle, and the following illustrations would suffice:

(a) where the substratum of the company has gone (*Galbraith v. Merito Shipping Co.* [1947] SC 446; *Re Kitson & Co., Ltd.* [1946] 1 All ER 435, CA; *Re Mediavision Ltd* [1993] 2 HKC 629; *Re Senson Auto Supplies Sdn. Bhd.* [1987] 1 LNS 110; and *Goodwealth Trading Pte Ltd, Re* [1991] 2 CLJ 1648; [1991] 4 CLJ (Rep) 822);

(b) where the company's main object for its existence has lapsed (*In re Haven Gold Mining Company* [1882] 20 Ch D 151, CA; *In re German Date Coffee Company* [1882] 20 Ch D 169 CA; *Re Red Rock Gold Mining Company Limited* [1889] 61 LT 785; *Re The Coolgardie Consolidated Gold Mines Limited* [1897] 76 LT 269 CA; *Palace Restaurants Ltd, Re* [1914] 1 Ch. 492, CA; and *Re Baku Consolidated Oilfields, Ltd.* [1944] 1 All ER 24);

(c) where the principal object of setting up the company can no longer be achieved (*Re Perfectair Holdings Ltd* [1990] BCLC 423);

(d) where the company's only business is *ultra vires* the company (*In re Crown Bank* [1890] 44 Ch D 634);

(e) where the company is carrying on its business at a loss and the remaining assets of the company are insufficient to pay its debts (*In re Wey and Arun Junction Canal Company* [1867] 4 LR Eq. 197; *In re Diamond Fuel Company* [1879] 13 Ch D 400, CA; and *Re Great Northern Copper Mining Co. of South Australia, Ltd., Ex p. The Co.* [1869] 20 LT 347);

(f) where there is no reasonable hope of ultimate profit for the company (*Davis & Co., Ltd., v. Brunswick (Australia), Ltd., Brunswicke-Balke-Collender Co. And Brunswick Radio Corporation* [1936] 1 All ER 299, at p. 309, PC);

(g) where the relationship of the parties in the company has broken down irretrievably (*Re Chynchen Associates Ltd* [1987] 1 HKC 311);

(h) where there is a lack of confidence among the shareholders that threaten the very existence of the company (*Re San Imperial Corp Ltd (No 2)* [1980] 1 HKC 463); and

(i) where the winding-up of the company would open the door to investigate the misconduct of the directors or promoters of the company (*In re General Phosphate Corporation, In re Northern Transvaal Gold Mining Company, In re Delhi Steamship Company* [1895] 1 Ch 3; *In Re Bleriot Manufacturing Aircraft Company Limited* [1916] 32 TLR 253; *In Re The Newbridge Sanitary Steam Laundry, Ltd.* [1917] 1 IR 67; and *In re The Varieties, Limited* [1893] 2 Ch. 235).

[24] The list is endless. It is not exhaustive.

[25] Be that as it may, the winding-up of the respondent was supported by the supporting creditor who was the only party that gave the notice of intention to appear.

[26] This was a watertight case for the petitioner. Nothing turned in favour of the respondent.

Conclusion

[27] For the reasons adumbrated above, we unanimously dismissed the appeal of the respondent with costs to be borne personally by Syed Mustafa bin Syed Ibrahim Al-Tahir bearing NRIC number 610130-66-5069. Deposit to the petitioner to account of taxed costs.